TAMAN ZAHARI ZABIDI SDN. BHD.

v.

ADNAN SUNDRA & LOW & ANOR.

SUPREME COURT KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[CIVIL APPEAL NO. 533 OF 1988]
15 JANUARY 1990

LEGAL PROFESSION: *Appeal - Whether solicitor acted against interest and instructions of clients.*

This is an appeal from the decision of the High Court dismissing the appellants claim that the respondents who were their solicitors had acted against their interest. The respondents were retained by the appellants to negotiate the purchase of certain properties. On 21 May 1982, the respondents prepared the necessary agreements which were duly signed by the appellants and vendors. The purchase was financed by Bank Bumiputra Malaysia Bhd. who retained the respondents, now acting as common solicitors to prepare the necessary documents for the loan.

By a letter of undertaking issued on 25 October 1982 in pursuance to the loan, the bank undertook to release the balance of the purchase price to the vendor upon confirmation from the respondents that the said transfer were complete and that the building plans were duly approved by the relevant authorities.

By a letter dated 2 December 1982, the appellants effected payment to the vendor's solicitors being registration fees of the said transfer and also instructed the bank to pay the registration fees to charge the land to the respondents.

Once the conditions in the said undertaking had been fulfilled the vendor's solicitors demanded the release of the balance of the purchase price. However by a letter dated 13 December 1982, the appellants countermanded their earlier instructions to the bank to pay the respondents their registration fee for the charges.

The respondents secured a loan from the vendor's solicitors for the sum required for the registration fee, registered the charges and instructed the bank to release the said balance to the vendor. The issue before the Court was whether the solicitors had acted contrary to client's instructions.

Held:

A copy of the letter dated 13 December 1982 from the appellant to the bank countermanding the earlier instructions to pay the respondents was never extended to the respondents. Hence, the respondents had no notice of the appellant's intention to abort the transfer and they could not be said to have acted in contravention of any instruction from the appellants.

[Appeal dismissed.]

Cases referred to:
Moody v. Cox & Hatt [1917] 2 Ch 71
Smith v. Mansi [1962] 3 All ER 857

Other source referred to:
Corderey on Solicitors, 7th Edn., p. 578

For the appellant - M.S. Murthi (Paul Ong with him); M/s. Paul Ong & Associates
For the 1st respondent - Porres P. Royan; M/s. Adnan, Sundra & Low
For the 2nd respondent - Vijay Kumar; M/s. Albar Zulkifly & Yap

JUDGMENT

Abdul Hamid Omar LP:

This appeal involves a claim by the first respondent, a firm of solicitors, for a sum of RM126,200 as disbursement made on behalf of the appellant in a land transaction. The appellant refused to pay contending that the first respondent had acted against their interest. The learned Judge found that the appellant's contention was baseless and awarded judgment against the appellant; hence the appeal.

The appeal against the second respondent, Bank Bumiputra Malaysia Bhd., was abandoned and consequently dismissed with costs. The remaining appeal against the first respondent, (now known simply as respondent), concerns their obligations as common solicitors to the appellant and Bank Bumiputra Malaysia Bhd.

In 1982, the appellant retained the respondent to negotiate the purchase of the lands at Telok Intan, Perak, for housing development. The vendor for the land was Messrs. Mah Poh Cheong Co. Sdn. Bhd. There was no written retainer of the respondent by the appellant but a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them. (*Corderey on Solicitors*, 7th Edn., p. 578). There is, however, no dispute that the respondent was retained by the appellant for this transaction.

On 21 May 1982, two agreements were prepared by the respondent in respect of this purchase and both the agreements were executed by the appellant and the vendor.

The purchase of the land was financed by Bank Bumiputra Malaysia Bhd., Kuala Lumpur, by a bridging finance of RM20,000,000 approved to the appellant on 31 May 1982. Subsequently, on 10 June 1982, Bank Bumiputra Malaysia Bhd. retained the respondent to prepare the necessary documents for the loan.

There is no general rule prohibiting the respondent to act as common solicitors to both the appellant and the bank but in such a situation, they must act at their own risk. (See *Moody v. Cox & Hatt* [1917] 2 Ch 71 and *Smith v. Mansi* [1962] 3 All ER 857).

On 25 October 1982, in pursuance of the loan, the bank issue a letter of undertaking in favour of the vendor in these terms:

Bank Bumiputra Malaysia Berhad
(Incorporated in Malaysia - Head Office - Kuala Lumpur)

Private & Confidential

M/s. Mah & Partners
Suite 4.70-4, 4th Floor,
Wisma Central,
Jalan Ampang,
Kuala Lumpur

Dear Sir,

Re: Letter of undertaking - Agreement dated 21 May 1982 made between Mah Poh Cheong Co. Sdn. Bhd. and Zahari Construction Sdn. Bhd. for the sale of the lands described therein for a total consideration of RM19,000,000

In consideration of your clients, Mah Poh Cheong Co. Sdn. Bhd. agreeing at our request and the request of Zahari Construction Sdn. Bhd. and Taman Zahari Zabidi Sdn. Bhd. to transfer all the lands purchased under the above mentioned agreement to Taman Zahari Zabidi Sdn. Bhd. We, Bank Bumiputra Malaysia Berhad, do hereby undertake to pay to you the whole of the balance sum of RM17.1 million by way of our cheque made out in favour of Mah Poh Cheong Co. Sdn. Bhd. upon our receipt of confirmation from our solicitors, Messrs. Adnan Sundra & Low, that all the said lands have in fact been registered in the name of Taman Zahari Zabidi Sdn. Bhd. or that the building plans for the first phase of 92 units of double storey terrace houses have been approved by the relevant authorities (whichever shall be the later).

Yours faithfully,
for Bank Bumiputra Malaysia Berhad
Domestic Banking Division
Head Office

Sgd.
(Abdul Aziz Haji Othman)
General Manager.

c.c. Taman Zahari Zabidi Sdn. Bhd.
M/s. Adnan Sundra & Low

On 12 December 1982 the appellant sent a cheque for RM210,000 to the vendor's solicitors for registration fees on the transfer of the lands to them and on the same day they also requested the bank to pay a sum of RM216,207 to the respondent as registration fee to charge the lands as security for their loan with the bank.

By 27 December 1982 the lands consisting of 655 titles were transferred to the appellant and earlier, on 22 November 1982, building plans in respect of the development of houses on the lands were approved by the relevant authorities, Majlis Daerah Hilir Perak, Telok Intan. The conditions in the undertaking by the bank having purportedly been fulfilled, the vendor's solicitors demanded for the release of the balance of purchase price for the land.

Meanwhile the appellant changed their mind and decided not to proceed with the purchase of the land. Their reason being that firstly, the building plans approved by the authorities did not include reinforced concrete plans and thus they could not proceed with the building project. Their other reason was that there was no water supply for the project until 1985. This was one of the conditions imposed in the building plans approved by the Majlis Daerah. In order to abort the purchase, the appellant, by letter dated 13 December 1982, countermanded their instructions to the bank to pay the registration fees for the charges.

It is in evidence that the vendor's solicitors offered a loan to the respondent for the sum required for the registration fee and it is not disputed that the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the bank to release the balance of the purchase price amounting to RM17 million to the vendor. On 30 December 1982, the bank released the money to the vendor.

This appeal however is confined only to one issue, namely whatever the solicitors can act contrary to client's instructions. Mr. Murthi, on behalf of the appellant, said that a solicitor's duty is to protect the interest of his client and to carry out his instructions in matters to which the retainer refers. He further submitted that the respondent was in breach of its duty to the appellant when acting in contravention of the express instructions of the appellant. That by so acting the respondent committed the appellant to greater liability than it chose to take. In that event the appellant was justified to repudiate liability for the RM126,207 and counterclaim against the respondent.

Mr. Royan, on behalf of the first respondent, submitted that the learned Judge did not find the respondent in breach of its retainer as solicitor to the appellant. He maintained that the learned Judge is correct to find that the respondent was not acting wrongly in advising the bank to release the RM17,000,000 loan to the vendor in compliance with the letter of undertaking.

In deciding the only issue canvassed before us in this appeal it is necessary to highlight some of the salient facts in order that the matter may be viewed in its proper perspective.

It is to be observed that on 29 November 1982 Mah & Partners wrote to the respondents, informing them that stamp duty payable on the transfer amounted to Two Hundred and Ten Thousand Ringgit (RM210,000). This letter was copied to the appellant (AC 83 p. 261 Appeal Record).

On 1 December 1982, the respondent wrote to the appellant drawing the appellant's attention to the letter from Messrs. Mah & Partners and asked the appellant to pay a further sum of RM214,368 (Two Hundred and Fourteen Thousand Three Hundred and Sixty Eight Ringgit), the sum required for registration of the transfer and the charge. The said sum included the sum of RM100,007 (One Hundred Thousand and Seven Ringgit) as stamp duty payable on the charge (AC 86 p. 264 Appeal Record).

It will be noticed that on 2 December 1982, the appellant wrote to the respondent informing the respondent that they made the payment of a sum of RM210,000 (Two Hundred and Ten Thousand Ringgit) as stamp duty for the transfer direct to Messrs. Mah & Partners (AC 87 p. 265 Appeal Record). In that letter reference was made to the respondent's letter of 1 December 1982 but no mention whatsoever was made to the respondent's request for a sum of RM214,368 (Two Hundred and Fourteen Thousand and Three Hundred and Sixty Eight Ringgit) and facts reveal that the appellant in fact paid the stamp duty for transfer of RM210,000 (Two Hundred and Ten Thousand Ringgit) to Messrs. Mah & Partners on 30 November 1982 as Messrs. Mah & Partners' receipt shows (AC 84 p. 262 Appeal Record).

Also on 2 December 1982, the appellant wrote to the bank asking the bank to pay a sum of RM126,000 (One Hundred and Twenty Six Thousand Ringgit) inclusive of a sum of RM107,000 (One Hundred and Seven Thousand Ringgit) for stamp duty for the charge to the respondent. For some reason unexplained this letter was not copied to the respondent nor was mention given of it in the appellant's letter of 2 December 1982 to the respondent.

Now on 8 December 1982, the respondent paid the stamp duty of RM107,000 (One Hundred Thousand and Seven Ringgit) (AC 89 p. 267 Appeal Record). This sum was advanced by Messrs. Mah & Partners. It was only on 13 December 1982, that the appellant wrote to the bank countermanding the earlier instruction of 2 December 1982. What is of importance to note is that no copy of this letter was extended to the respondent.

Viewed in the light of these facts, it is clear that all along the respondent was acting in accordance with the instruction of the appellant regardless of the fact that the sum required for the stamp duty for the transfer had not been paid by the bank but advanced by Messrs. Mah & Partners. It would have been otherwise, or in other words the respondent may be said to have acted in contravention of the appellant's instruction if the appellant had given notice to the respondent of their letter of 13 December 1982 to the bank countermanding the instruction given on 2 December 1982. There was nothing of that sort here.

The appellant's letter to the bank dated 2 December 1982 was not copied to the respondent. Nor was the respondent informed by the bank of the appellant's letter countermanding the earlier instruction. It is evident that the respondent had no knowledge whatsoever of the appellant's countermanding instruction. For these reasons, we have no reason to hold that the respondent had any time acted in contravention of any instruction from the appellant. It is therefore our view that the appellant's allegations contained in para. 16 of the amended defence and counterclaim had not at all been substantiated.

Accordingly, the appeal is dismissed with costs.

Also found at [1990] 1 CLJ 891